

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PERLA HERNANDEZ,)
vs.)
Plaintiff,) Case No.: 2:13-cv-01365-GMN-CWH
BANK OF AMERICA, *et al.*,)
Defendants.)
)

Pending before the Court is a *pro se* civil action filed by Perla Hernandez (“Plaintiff”) against Bank of America, N.A., incorrectly sued as Bank of America, (“BOA”) and ReconTrust Company N.A., incorrectly sued as Recontrust Company, (“ReconTrust”) (Complaint, ECF No. 1.) Defendants filed a Motion to Dismiss Plaintiff’s Complaint (ECF No. 13) on October 2, 2013, and Plaintiff filed a Response in Opposition (ECF No. 16) on October 11, 2013. On October 16, 2013, Defendants filed a Reply in Support of their Motion to Dismiss. (ECF No. 17.)

For the following reasons, the Court will **GRANT** Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 13.)

I. **BACKGROUND**

On February 28, 2005, Plaintiff financed the purchase of some property, located at 9975 Peace Way, Las Vegas, Nevada 89147, APN# 163-19-313-074 (the “Property”), by obtaining a \$203,841.00 loan from Countrywide Home Loans, Inc. (“Countrywide”), which was secured by a Deed of Trust. (Deed of Trust, ECF No. 13-1.)¹ The Deed of Trust named Mortgage

¹ The Court takes judicial notice of Exhibits A-M of Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 13.) *See Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Each of these documents is

1 Electronic Registration Systems, Inc. (“MERS”) as the beneficiary and Nevada Title as the
 2 Trustee and granted MERS the right to foreclose on the Property. (*Id.*) On February 24, 2011,
 3 MERS executed a Corporation Assignment of Deed of Trust, making The Bank of New York
 4 Mellon fka The Bank of New York the beneficiary under the Deed of Trust. (Corporation
 5 Assignment of Deed of Trust, ECF No. 13-2.)² MERS also executed a Substitution of Trustee
 6 on February 24, 2011, naming ReconTrust as trustee. (Substitution of Trustee, ECF No. 13-3.)³

7 Plaintiff does not deny in any of her pleadings that around February of 2008, she ceased
 8 making payments on her mortgage. (Complaint, ECF No. 1; Notice of Default and Election to
 9 Sell, ECF No. 13-4.)⁴ As a result of Plaintiff’s failure to pay, on February 24, 2011,
 10 ReconTrust recorded a Notice of Default and Election to Sell. (Notice of Default and Election
 11 to Sell, ECF No. 13-4.)

12 ReconTrust recorded a Foreclosure Mediation Certificate on May 25, 2011, which
 13 identified the Property as one that does not require mediation for foreclosure to proceed.
 14 (Mediation Foreclosure Certificate, ECF No. 13-5.)⁵ ReconTrust also recorded a Notice of
 15 Trustee Sale on May 25, 2011, setting a foreclosure sale of the Property for June 14, 2011 at
 16 10:00 am. (May 2011 Notice of Trustee’s Sale, ECF No. 13-6.)⁶

17
 18
 19
 20 publicly recorded in the Clark County Recorder’s office. The Deed of Trust was recorded in Clark County as
 21 Book and Instrument No. 20050302-0000420. (Deed of Trust, ECF No. 13-1.)

22 ² The Corporation Assignment of Deed of Trust was recorded in Clark County as Book and Instrument No.
 20110228-0002088. (Corporation Assignment of Deed of Trust, ECF No. 13-2.)

23 ³ The Substitution of Trustee was recorded in Clark County as Book and Instrument No. 20110228-0002089.
 24 (Substitution of Trustee, ECF No. 13-3.)

25 ⁴ The February 2011 Notice of Default and Election to Sell was recorded in Clark County as Book and
 26 Instrument No. 20110224-0001679. (Notice of Default and Election to Sell, ECF No. 13-4.)

⁵ The Mediation Foreclosure Certificate was recorded in Clark County as Book and Instrument No. 20110525-
 27 0003400. (Mediation Foreclosure Certificate, ECF No. 13-5.)

⁶ The May 2011 Notice of Trustee’s Sale was recorded in Clark County as Book and Instrument No. 20110525-
 28 0003401. (May 2011 Notice of Trustee’s Sale, ECF No. 13-6.)

1 On June 6, 2011, however, Plaintiff filed an “Affidavit of Fact” in which she avers
 2 several unsupported and conclusory statements,⁷ including the demonstrably false statement
 3 that the mortgage loan is “invalid … since the lender did not, in fact, provide an actual loan to
 4 [Plaintiff].” (Affidavit of Fact, ECF No. 13-7;⁸ Deed of Trust, ECF No. 13-1.) On June 28,
 5 2011, Plaintiff also recorded a “Deed of Full Reconveyance,” which appears to be a fraudulent
 6 document,⁹ wherein an individual identified as Alex P. Soria claims to be Trustee under the
 7 Deed of Trust and purports to reconvey the Property to Plaintiff “by reason of satisfaction of
 8 the obligation secured by said Deed of Trust.” (Deed of Full Reconveyance, ECF No. 13-8.)¹⁰

9 Subsequently, on November 16, 2011, ReconTrust recorded an Affidavit of Erroneous
 10 Recordation, declaring the Deed of Full Reconveyance to have been recorded “in error or
 11 fraudulently by unknown unauthorized persons.” (Affidavit of Erroneous Recordation, ECF
 12 No. 13-9.)¹¹ Thereafter, ReconTrust recorded Notices of Trustee’s Sale on March 6, 2012,
 13 September 11, 2012, and February 27, 2013 (March 2012, Sept. 2012, and Feb. 2013 Notices of
 14 Trustee’s Sale, ECF Nos. 13-10, 13-11, 13-12.)¹² The Property was then sold at foreclosure,

16
 17 ⁷ These statements include, that Defendants’ “fractionalized investment banking practices” constituted “unjust
 18 enrichment,” that some “Deed of Trust” for which there is no identifying information granted Plaintiff the
 19 Property free and clear, that Defendants do not have the original copy of the Note, and that MERS “has no legal
 20 standing to conduct business in Nevada.” (Affidavit of Fact, ECF No. 13-7.) Because these statements are of
 21 dubious authenticity and are not included in Plaintiff’s Complaint, any claims they may assert against
 22 Defendants are not considered in this Order on Defendants’ Motion to Dismiss. *See Hal Roach Studios, Inc. v.*
Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.
 23 1994).

24 ⁸ The Affidavit of Fact was recorded in Clark County as Book and Instrument No. 20110606-0002533. (Affidavit
 25 of Fact, ECF No. 13-7.)

2 ⁹ In Nevada, it is a category C felony, punishable by up to five years imprisonment and a fine of up to \$10,000,
 2 to “knowingly procure[] or offer[] any false or forged instrument to be filed, registered or recorded in any public
 3 office....” Nev. Rev. Stat. § 239.330.

4 ¹⁰ The Deed of Full Reconveyance was recorded in Clark County as Book and Instrument No. 20110628-
 5 0002181. (Deed of Full Reconveyance, ECF No. 13-8.)

6 ¹¹ The Affidavit of Erroneous Recordation was recorded in Clark County as Book and Instrument No. 20111116-
 7 0002300. (Affidavit of Erroneous Recordation, ECF No. 13-9.)

8 ¹² The Notices of Trustee’s Sale were recorded in Clark County as Book and Instrument Nos. 20120306-
 9 0002600; 20120911-0004028; and 20130227-0002858. (March 2012, Sept. 2012, and Feb. 2013 Notices of
 10 Trustee’s Sale, ECF Nos. 13-10, 13-11, 13-12.)

1 and on March 22, 2013, ReconTrust recorded a Trustee's Deed upon Sale. (Trustee's Deed
 2 upon Sale, ECF No. 13-13.)¹³

3 Plaintiff filed her Complaint on August 2, 2013. (Complaint, ECF No. 1.) Liberally
 4 construing the inartfully pled Complaint, Plaintiff appears to be asserting a claim for wrongful
 5 foreclosure and seeks quiet title based upon Plaintiff's alleged "Good-Faith Offers to Pay" and
 6 Plaintiff's unsupported allegations that the foreclosure was conducted with "fraudulent court
 7 documents." (*Id.*) Also attached to the Complaint is a "Brief in support of Complaint," which
 8 consists of two pages of convoluted citations to federal statutes without any explanation of how
 9 these statutes apply to the current case. (*Id.* at pp. 50-52.) Furthermore, Plaintiff's Opposition
 10 to Defendants' Motion to Dismiss (ECF No. 16) fails to provide any additional facts or relevant
 11 law supporting the claims alleged in the Complaint.

12 **II. LEGAL STANDARD**

13 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
 14 that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona*
 15 *Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss
 16 under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the
 17 complaint does not give the defendant fair notice of a legally cognizable claim and the grounds
 18 on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering
 19 whether the complaint is sufficient to state a claim, the Court will take all material allegations
 20 as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v.*
 21 *Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

22 The Court, however, is not required to accept as true allegations that are merely
 23 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
 24

25 ¹³ The Trustee's Deed upon Sale was recorded in Clark County as Book and Instrument No. 20130322-0002606.
 (Trustee's Deed upon Sale, ECF No. 13-13.)

1 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
 2 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
 3 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing
 4 *Twombly*, 550 U.S. at 555) (emphasis added).

5 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
 6 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
 7 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir. 2008). Rule 8(a)(2) requires that a plaintiff's
 8 complaint contain "a short and plain statement of the claim showing that the pleader is entitled
 9 to relief." Fed. R. Civ. P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because
 10 "they impose unfair burdens on litigants and judges." *McHenry v. Renne*, 84 F.3d 1172, 1179
 11 (9th Cir. 1996). Mindful of the fact that the Supreme Court has "instructed the federal courts to
 12 liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132,
 13 1137 (9th Cir. 1987), the Court will view Plaintiffs' pleadings with the appropriate degree of
 14 leniency.

15 "Generally, a district court may not consider any material beyond the pleadings in ruling
 16 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
 17 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*
 18 & Co.

19 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents
 20 whose contents are alleged in a complaint and whose authenticity no party questions, but which
 21 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
 22 motion to dismiss" without converting the motion to dismiss into a motion for summary
 23 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule of
 24 Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay*
 25 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
 materials outside of the pleadings, the motion to dismiss is converted into a motion for

1 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th
 2 Cir. 2001).

3 **III. DISCUSSION**

4 **A. Wrongful Foreclosure**

5 In Nevada, the common law tort of wrongful foreclosure requires a plaintiff to “establish
 6 that at the time the power of sale was exercised or the foreclosure occurred, no breach of
 7 condition or failure of performance existed on the mortgagor’s or trustor’s part which would
 8 have authorized the foreclosure or exercise of the power of sale.” *Collins v. Union Fed. Sav. &*
 9 *Loan Ass’n*, 662 P.2d 610, 623 (Nev. 1983).

10 Nevada statutes do not require parties initiating foreclosure to first provide proof that
 11 they are the holder and owner of the mortgage and note. Securitization does not bar a party
 12 from initiating foreclosure proceedings. *See* Nev. Rev. Stat. § 107.080; *Chavez v. California*
 13 *Reconveyance Co.*, 2010 WL 2545006, at *2 (D. Nev. 2010) (“NRS 107.080 does not forbid
 14 the securitization of a loan.”).

15 Though never explicitly stated as a claim for wrongful foreclosure, Plaintiff’s alleges in
 16 her Complaint that she “is in lawful possession of documentation indicat[ing] that the subject
 17 loan was paid in full” and that Defendants “have instituted a [f]oreclosure proceeding based on
 18 fraudulent court documents in which they claim to have a security interest when it can be
 19 proved that they do not.” (Complaint pp. 3-4, ECF No 1.) Liberally construed, these assertions
 20 may contain a claim for wrongful foreclosure.

21 However, Plaintiff fails to provide these alleged documents or to allege any additional
 22 facts supporting her claims based on her payment of the loan or Defendants’ use of fraudulent
 23 documents. Indeed, other than these two conclusory statements, Plaintiff’s Complaint is utterly
 24 devoid of any information concerning these allegations. These two bald assertions alone fail to
 25 give Defendants fair notice of a legally cognizable claim and the grounds on which it rests. *See*

1 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Likewise, they fail to contain a short
2 and plain statement of the claim showing that Plaintiff is entitled to relief. *See* Fed. R. Civ. P.
3 8(a)(2). Furthermore, Plaintiff's Complaint fails to assert that she was not in breach of the
4 mortgage at the time of sale, so there can be no sustainable action for wrongful foreclosure.

5 **B. Plaintiff's "Good-Faith Offers to Pay"**

6 Attached to Plaintiff's Complaint were five documents entitled "Notice of Default and
7 Opportunity to Cure with New Good-Faith Offer to Pay the Total Amount Due," which
8 Plaintiff asserts were "neither accepted nor rejected [and] caused the alleged Loan to be
9 completely and totally [d]ischarged." (Complaint, Ex: B pp. 3-6, 17-32, ECF No 1.) Plaintiff's
10 delivery and Defendants' disregard of these Good-Faith Offers are the only factual allegations
11 contained in the Complaint other than the occurrence of a foreclosure and identifying
12 information about the Parties and the Property. (*Id.*)

13 Though Plaintiff asserts that these Good-Faith Offers "caused the alleged Loan to be
14 completely and totally [d]ischarged," Plaintiff fails to provide any citation to legal authority for
15 this claim in either her Complaint or her Response in Opposition to Defendants' Motion to
16 Dismiss. (ECF Nos. 1, 16.) Furthermore, the first of these Good-Faith Offers was allegedly
17 delivered to Defendants on January 30, 2013, almost two years after the Notice of Default was
18 recorded and the foreclosure sale of the Property occurred. (Complaint, Ex: B pp. 17-19, ECF
19 No 1; Feb. 2013 Notice of Trustee's Sale, ECF No. 13-12; Trustee's Deed upon Sale, ECF No.
20 13-13.)

21 This Court is unaware of any law in Nevada that would grant a cause of action for
22 ignoring an offer to pay a debt. Therefore, to the extent these Good-Faith Offers assert an
23 independent claim, that claim is dismissed. Moreover, this Court cannot even reasonably
24 conceive of a law that allows an ignored offer to pay a debt to retroactively discharge that debt
25 and invalidate a foreclosure sale based upon a default on that debt that occurred years prior to

1 the offer. Therefore, to the extent these Good-Faith Offers attempt to support Plaintiff's
 2 wrongful foreclosure claim, they are ineffective.

3 **C. Quiet Title**

4 In Nevada, a quiet title action may be brought "by any person against another whom
 5 claims an estate or interest in real property, adverse to the person bringing the action, for the
 6 purpose of determining such adverse claim." NRS 40.010. "In a quiet title action, the burden of
 7 proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities*
 8 *Corp.*, 918 P. 2d 314, 318 (Nev. 1996). "Additionally, an action to quiet title requires a
 9 plaintiff to allege that she has paid any debt owed on the property." *Lalwani v. Wells Fargo*
 10 *Bank, N.A.*, No. 2:11-cv-00084-KJD-PAL, 2011 WL 4574388 at *3 (D. Nev. Sep. 30, 2011)
 11 (citing *Ferguson v. Avelo Mortg., LLC*, No. B223447, 2011 WL 2139143 at *2 (Cal. App. 2d
 12 June 1, 2011)). Plaintiff has failed to allege that she was not in breach of the mortgage.
 13 Accordingly, this cause of action is dismissed.

14 **D. Leave to Amend**

15 Generally, if the court grants a motion to dismiss, it must then decide whether to grant
 16 leave to amend. The court should "freely give" leave to amend when there is no "undue delay,
 17 bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party
 18 by virtue of . . . the amendment, [or] futility of the amendment . . ." Fed. R. Civ. P. 15(a);
 19 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is
 20 clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v.*
 21 *Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

22 Here, granting Plaintiff additional time to amend her Complaint would be futile and
 23 cause undue delay and prejudice to Defendants by further prolonging this suit. Plaintiff has not
 24 sought leave to amend her Complaint, and she has failed to provide sufficient facts to assert any
 25 claim in both her Complaint and in her Response in Opposition to Defendants' Motion to

1 Dismiss (ECF No. 16.) Because Plaintiff was unable to plead any specific facts showing she
2 was not in default at the time of foreclosure in her Complaint or her Response in Opposition to
3 Defendants' Motion to Dismiss, it is unlikely that Plaintiff would suddenly be able to
4 sufficiently plead her claim of wrongful foreclosure or for quiet title. Furthermore, the Court
5 notes that Plaintiff has already caused two fraudulent documents to be recorded in Clark
6 County in a bad faith effort to prevent Defendants from exercising their legal rights. Therefore,
7 allowing Plaintiff additional time to amend her Complaint would serve no purpose but to
8 prejudice Defendants.

9 **IV. CONCLUSION**

10 **IT IS HEREBY ORDERED** that Defendants' Motion to Dismiss (ECF No. 13) is
11 **GRANTED**. All of Plaintiff's claims are dismissed with prejudice.

12 The Clerk of the Court shall enter judgment accordingly.

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14 **DATED** this 14 day of April, 2014.



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17 Gloria M. Navarro, Chief Judge
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United States District Judge